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Kuok Ling Timber Industries Sdn Bhd v The Owners of and other persons interested in the vessel 'MV Thonfullin'

HIGH COURT (SIBU) — ADMIRALTY IN REM NO 20–27–03 OF 1995
B TEE AH SING J
16 FEBRUARY 2000

Shipping and Navigation *— Carriage of goods — Damage and/or loss to goods — Bailment for reward for carriage of sawn timber — Whether vessel sank due to act of God — Onus on bailees for reward to prove that damage to goods not caused by any fault of bailees — Whether res ipsa loquitur applies — Whether custom or practice that cargo owners*
C *must insure goods being transported in vessels — Exemption of liability, principles applicable*

The plaintiffs transported 233 bundles of sawn timber on board the vessel owned by the defendants. The vessel sunk and the sawn timber were damaged. The plaintiffs brought an admiralty action in rem
D against the defendants. The defendants submitted that: (i) the vessel sunk due to an act of God; (ii) by local custom and/or trade practices, it was for the plaintiffs to take up insurance for the sawn timber to be carried by any vessel; and (iii) the contract between the plaintiffs and their customer could not be admitted as exhibit by virtue of O 92 r 1 of the Rules of the High Court 1980 ('the RHC') because the
E document contained language other than English.

Held, allowing the plaintiff's claim:

(1) The court found as a fact that the 233 bundles of sawn timber were delivered and loaded onto the vessel and that the agreed
F freight rate between the plaintiffs and the defendants was RM13 per ton exclusive of insurance coverage. Thus, the contract between the plaintiffs and the defendants was a bailment for reward (see p 630B–C).

(2) The defendants did not adduce evidence to the effect that there was a sudden violent storm or an extraordinary high tide in the
G river at that material time which could not have been foreseen and which could not have been guarded against. The defendants had also not adduced any evidence which could have constituted an act of God. Therefore, the defendants had failed to prove that the vessel sank due to an act God (see p 631C–D).

H (3) The onus was for the defendants as bailees for reward to prove that the damage to the sawn timber bailed to them were not caused by any fault of theirs or any of their servants or agents. The court found that the defendants had failed to prove that they had taken due care of the plaintiffs' sawn timber. This was a clear case of res ipsa loquitur (see p 632E–F).

I (4) The defendant had not proved that there was a custom or practice that the cargo owners had to buy insurance for the sawn timber being transported in vessels. The court found that the practice or

custom was not generally known and could not have the force of law (see p 633C–F).

(5) The law does not forbid the vessel owner to exempt himself by contract from liability for the negligence of himself, his servants or agents but if the vessel owner desires so to exempt himself, it requires that he shall do so in express, plain and unambiguous terms. In the present case, there was no such exemption clause. Even if there was a custom or trade practice that it was the responsibility of the plaintiffs to insure the sawn timber, in the absence of any exemption clause to the effect that the defendants were not liable for any loss or damage caused by the negligence of the defendants, the defendants were liable for their breach of duty as bailees for reward to use reasonable care and skill to ensure the safety of the sawn timber. The court found that the plaintiffs had proved that the damage to the sawn timber were caused by the negligence of the defendants. As such, the defendants were liable for the damage caused to the sawn timber (see p 633H–634B).

[Bahasa Malaysia summary

Plaintif-plaintif telah memindahkan 233 ikatan kayu balak yang digergaji ke atas kapal yang dimiliki oleh defendan-defendan. Kapal tersebut telah tenggelam dan balak-balak gergaji tersebut telah dirosakkan. Plaintif-plaintif telah membawa tindakan admiralti in rem terhadap defendan-defendan. Defendan-defendan telah berhujah bahawa (i) kapal tersebut telah tenggelam kerana takdir Tuhan; (iii) menurut adat dan/atau amalan perdagangan, adalah bagi plaintif-plaintif untuk mengambil insurans untuk balak gergaji yang akan diangkut oleh sebarang kapal; dan (iii) kontrak antara plaintif-plaintif dan pelanggan mereka tidak boleh dimasukkan sebagai ekshibit menurut A 92 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana dokumen tersebut mengandungi bahasa lain dari Bahasa Inggeris.

Diputuskan, membenarkan tuntutan plaintif:

(1) Mahkamah mendapati sebagai fakta bahawa 233 ikatan balak yang digergaji telah diterimakan dan dimasukkan ke atas kapal dan kadar bayaran pengangkutan yang dipersetujui antara plaintif-plaintif dan defendan-defendan adalah RM13 setan tidak termasuk perlindungan insurans. Oleh itu, kontrak antara plaintif-plaintif dan defendan-defendan adalah bailmen untuk balasan (lihat ms 630B–C).

(2) Defendan-defendan tidak mengemukakan keterangan yang menunjukkan bahawa terdapat ribut kuat secara tiba-tiba atau air pasang yang tinggi di sungai pada masa yang material yang tidak dapat dijangka dan tidak boleh dilindungi. Defendan-defendan juga tidak mengemukakan sebarang keterangan yang boleh terjumlah kepada suatu takdir Tuhan (lihat ms 631C-D).

(3) Beban adalah di atas defendan-defendan sebagai baili yang menerima balasan untuk membuktikan bahawa kerosakan kepada balak-balak gergaji yang dibailkan kepada mereka tidak diakibatkan oleh kesalahan mereka atau pekerja-pekerja atau wakil-wakil mereka. Mahkamah mendapati bahawa defendan gagal untuk membuktikan bahawa mereka telah memberikan penjagaan yang wajar akan balak-balak gergaji plaintif. Ini adalah suatu kes jelas res ipsa loquitor (lihat ms 632E–F).

(4) Defendan tidak membuktikan bahawa terdapat adat atau amalan bahawa pemilik-pemilik kargo mestilah membeli insurans untuk balak-balak gergaji yang diangkut di dalam kapal. Mahkamah mendapati bahawa amalan dan adat tersebut tidak diketahui secara am dan tidak mempunyai kuasa undang-undang (lihat ms 633C–D).

(5) Undang-undang tidak menghalang pemilik kapal untuk mengecualikan dirinya melalui kontrak daripada liabiliti untuk kecuaian dirinya sendiri, pekerja-pekerja atau wakilnya tetapi jika tuan punya kapal ingin mengecualikan diri, adalah perlu bagi beliau untuk berbuat demikian di dalam terma yang nyata, biasa dan jelas. Di dalam kes ini, tidak terdapat fasal pengecualian sedemikian. Walau sekalipun terdapat adat atau amalan perdagangan bahawa ia adalah tanggungjawab plaintif-plaintif untuk menginsuranskan balak gergaji, di sebalik ketiadaan sebarang fasal pengecualian bahawa defendan tidak bertanggungan untuk sebarang kerugian atau kerosakan yang diakibatkan oleh kecuaian defendan-defendan, defendan-defendan adalah bertanggungan untuk pemecahan tugas sebagai baili-baili yang menerima balasan agar menerima pakai sikap berhati-hati dan kepakaran yang munasabah untuk memastikan keselamatan balak-balak gergaji tersebut. Mahkamah mendapati bahawa plaintif-plaintif telah membuktikan bahawa kerugian kepada balak gergaji telah diakibatkan oleh kecuaian defendan-defendan. Oleh itu, defendan-defendan adalah bertanggungan untuk ganti rugi yang diakibatkan kepada balak gergaji tersebut (lihat ms 633H–634B).]

Notes

For a case on damage/loss to goods, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1176.

Cases referred to

Chan Cheng Kum & Anor v Wah Tat Bank Ltd & Anor [1971] 1 MLJ 177 (refd)

Kwan Sun Ming v Chak Chee Hing [1965] 1 MLJ 236 (refd)

Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd [1978] 2 MLJ 137 (refd)

Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420 (refd)

Yap Piew Chuan v Araca Enterprise Sdn Bhd [1998] 1 AMR 645 (refd)

Legislation referred to

Rules of the High Court 1980 O 92 r 1

Stephen Chung (*Stephen, Robert & Wong*) for the plaintiff.
Wong Sing Nang (*Wong, Orlando Chua & Co*) for the defendants.

Cur Adv Vult

Tee Ah Sing J: This is an admiralty action in rem by Kuok Ling Timber Industries Sdn Bhd ('the plaintiffs') against the owners of and other persons interested in the vessel 'MV Thonfullin' ('the defendants').

The case for the plaintiffs is as follows:

Sia Wee Ching (PW1) has testified in examination-in-chief that he is a manager of Kuok Ling Timber Industries Sdn Bhd ('the plaintiffs') for ten years.

In May 1995, he was a manager of the plaintiffs. The plaintiffs operate a sawmill at Jalan Tanjong Maling Baru, Engkilo, Sibu. The sawmill is downriver from Sibu. His company has local and overseas customers. Pro Sooner Co Ltd of Taiwan was one of their customers. In May 1995, Pro Sooner Co Ltd bought sawn timber from the plaintiffs. A contract was signed on 16 May 1995 between the plaintiffs and Pro Sooner Co Ltd. The contract was regarding the purchase of sawn timber such as alan batu, kapur, keruing, meranti and MLH by Pro Sooner Co Ltd from the plaintiffs. The price as stated in the contract as FOB Tg Manis, kapur and keruing 1 cubic meter costs USD380. For meranti and alan batu the cost is 1 cubic meter for USD360. And for MLH the cost is USD260 per cubic meter. The payment was to be made by telegram transfer. The delivery date stated was end of May 1995. The place of delivery was at Tg Manis, Sarawak. The contract (P1) was signed by Chiew Ing Chung, the managing director of the plaintiffs. He identified the signature of Chiew Ing Chung on P1.

After the contract he instructed the employees to saw the timber. He instructed and supervised his employees to do the packing. A packing list (P2) was prepared on his instructions. In the packing list it was stated the different species of timber, the quantity of each species and the number of pieces and the volume of each species. For kapur and keruing there were 78 bundles. The volume is 109.4063 cubic meter. He stated that BP4 sets out the total price of the different species of timber under the contract. And the total price is USD110,831.33.

In the packing list, the total number of bundles stated is 233 bundles and the total volume stated is 310.8260 cubic meter.

A bundle list (P3) was also prepared. In P3, it consists of the bundle number, size, the number of pieces of each species of sawn timber in each bundle. The sawn timber were prepared and packed according to the packing list and the bundle list. He asked 'MV Thonfullin' to transport the sawn timber to Tg Manis.

P4 is the delivery order dated 29 May 1995 issued by the plaintiffs. It is in respect of the alan batu, meranti, kapur, keruing, MLH sawn timber and

A the total number of bundle is 233. The volume is 310.826 cubic meter. It was to be delivered to 'MV Thonfullin' and from 'MV Thonfullin' to 'MV Berry' at Tg Manis. All the sawn timber were delivered to 'MV Thonfullin'. He was present when someone on board the 'MV Thonfullin' signed the delivery order. A clerk by the name of Ivy Kho signed on behalf of the plaintiffs. He pointed to the signature of the person who signed on B behalf of 'MV Thonfullin' at the bottom left of P4. The sawn timber were not delivered at Tg Manis. He was informed by someone through the phone that the vessel 'MV Thonfullin' sank and the sawn timber were not delivered.

As a result, he lodged a report (P6) at the Police Station Sibu. He also C lodged a report (P5) at the Marine Department Sibu on 30 May 1995. In both his reports, he reported that the 'MV Thonfullin' sank at Tetsan wharf Upper Lanang Road, Sibu and that the 233 bundles of sawn timber were missing. He learnt that the company of the vessel 'MV Thonfullin' went to find and recover some sawn timber. After they have recovered some of the sawn timber they gave the recovered sawn timber to the plaintiffs.

D The conditions of the sawn timber were dirty. There were changes in the measurements. The sawn timber were stained. He washed the sawn timber and repacked. He managed to form 148 bundles from the recovered sawn timber. The 148 bundles of sawn timber were exported and shipped to Taiwan. 110 bundles were exported while the remaining 38 bundles were E rejected because the quality was not up to the standard for export. Of the 110 bundles exported to Taiwan, 96 bundles were sold. The other 14 bundles were rejected by Pro Sooner Co Ltd. The 96 bundles of recovered timber were sold for USD36,193.83. He prepared an invoice (P8). The managing director Chiew Ing Chung signed it. The report (P7) he prepared was also signed by Chiew Ing Chung.

F In P8 the price of alan batu is USD6,244.57. The price per cubic meter is USD318. The price of kapur and keruing per cubic meter is USD286. The price of Meranti per cubic meter is USD286. And the price of MLH per cubic meter is USD190. The prices are lower as stated in P1 was because the quality of the timber was not the same anymore and did not G meet the standard for export. The prices in P8 were the market price then. The prices in P8 were also the market rate.

He did prepare a packing list (P9) for the sawn timber recovered. In P9 it is stated the number of the bundle, the number of pieces in each bundle and the species of timber. It is for the 110 bundles exported.

H He also prepared a packing list (P10) for 38 bundles of the rejected sunken sawn timber. He also prepared a bundle list (P11). It showed the bundle number, the number of pieces in each bundle and the meranti, kapur and keruing species. Mr Chiew Ing Chung signed the bundle list.

When he asked 'MV Thonfullin' to transport the timber from the sawmill to Tg Manis he has to pay RM13 per ton. He did not have to buy I insurance for the timber. He did not know whether there was any custom or trade practice that the owner of goods to be transported in vessels must buy insurance for the goods.

In cross-examination, PW1 stated that he had one previous dealing with 'MV Thonfullin'. A

From delivery note (D1) dated 12 April 1995 and delivery note (D2) dated 14 April 1995 his company instructed 'MV Thonfullin' to transport the sawn timber from Sibu to Tg Manis. So for that transportation 'MV Thonfullin' issued an invoice (IDD3) for the payment of the service rendered. From the invoice it is stated RM13 per ton. And the freight charges were RM5,639.52. B

He has been involved in preparing the packing list and the bundle list and also to arrange the transport of the sawn timber from Sibu to Tg Manis for six years. As an experienced manager for six years his company did not take up insurance cover for the insurance of the sawn timber for the journey from Sibu to Tg Manis. C

FOB in P1 refers to the price of the sawn timber. It means the costs of the sawn timber include the freight charges from Sibu to Tg Manis.

He agreed that RM13 is the freight charges. His company did not give the 'MV Thonfullin' the total value of the sawn timber to be transported by 'MV Thonfullin'. D

He disagreed that for his first transaction with 'MV Thonfullin' that it was his company to buy the insurance coverage for the journey from Sibu to Tg Manis.

He disagreed that it is a trade practice along the Rejang river that the shipper who is the cargo owner to take up insurance coverage for the transportation of sawn timber from Sibu to Tg Manis. E

He disagreed that if he did not give 'MV Thonfullin' the value then it is his duty as shipper to insure the cargo.

He was asked: 'If no value of the sawn timber to be transported by "MV Thonfullin" then can you tell the court how "MV Thonfullin" is going to insure the cargo from Sibu to Tg Manis?' and he answered, 'They should ask our company and our company will inform them.' F

He disagreed that for all the transportation of sawn timber from Sibu to Tg Manis the local practice is for the shipper to buy the insurance cover for the cargo. G

Chiw Ing Choo @ Chiew Ing Chung (PW2) stated that he is the managing director of the plaintiffs. In May 1995 the manager of the plaintiffs was Mr Sia Wee Ching. His company has a customer by the name of Pro Sooner Co Ltd from Taiwan. In May 1995 his company sold sawn timber to Pro Sooner Co Ltd. He identified P1 as the contract. He signed at the bottom of Pl. The contract is to sell sawn timber. According to the contract the timber had to be delivered to Tg Manis. His manager Sia Wee Ching arranged for 'MV Thonfullin' to transport the sawn timber from their sawmill to Tg Manis. H

The sawn timber were loaded onto 'MV Thonfullin'. And 'MV Thonfullin' was supposed to transport the cargo from their sawmill to Tg Manis but the next morning at about 8am he was informed by Sia Wee I

Ching that the vessel had capsized and sank somewhere at Upper Lanang at Tetsan wharf.

He knew that some sawn timber were subsequently recovered. He did see the recovered sawn timber. The sawn timber were covered with mud and the colour changed. He signed on P7 and he pointed to his signature on P7. He signed at the bottom of P8. P8 is the invoice issued to Pro Sooner Co Ltd in respect of the recovered sawn timber. He signed at the bottom of P10. P10 is the packing list for the rejected sunken sawn timber. He signed at the bottom parts of both pages of P11.

He has to pay RM13 per ton to 'MV Thonfullin' for transporting the sawn timber from the sawmill to Tg Manis. The price did not include insurance. It covers the freight charges from Kuok Ling Sawmill to Tg Manis. His company did not have to buy insurance for that trip.

'MV Thonfullin' did not tell him that he has to buy insurance for that trip. He did not know whether there was any local custom or trade practices that the owner of sawn timber to be transported in the motor vessel have to buy insurance.

In cross-examination PW2 said that he has been in the sawn timber export business for about ten years. He did not ever tell the vessel owner how much the sawn timber worth when 'MV Thonfullin' transported it. He disagreed that there is a local custom or trade practice that the shipper is responsible for any sawn timber to be transported by motor vessel to buy their own insurance cover from Sibu to Tg Manis.

Ivy Kho Tiee Ying (PW3) has testified she is employed by Kuok Ling Timber Industries Sdn Bhd. The company is dealing with sawn timber. It has a sawmill at Jalan Maling Engkilo. She stated that she is a general clerk. She did the typing. Her employer prepared the invoice and delivery order and she did the typing. P4 was prepared by her. She signed on P4. P4 is a delivery order. This was prepared after the sawn timber have been loaded into the vessel 'MV Thonfullin'. This served to prove that the sawn timber has been received by the vessel 'MV Thonfullin'. The name of the vessel is written in P4. Someone signed on behalf of 'MV Thonfullin' acknowledging receipt of the sawn timber. The signature is on the left bottom part below the name of vessel 'Thonfullin'.

She did witness the loading of the sawn timber onto 'MV Thonfullin'. The sawn timber were to be delivered to Tg Manis to a vessel 'MV Berry'. This name is written in the delivery order (P4).

There was no cross-examination of PW3.

Shik Hung Hsi (PW4) has testified in his examination-in-chief that he is employed by Pro Sooner Co Ltd. His company bought sawn timber from Kuok Ling Timber Industries Sdn Bhd in Sibu. He came from Taiwan together with a colleague to Sibu to purchase the sawn timber.

In P1, the signature in Chinese characters is that of his colleague. His name is Chen Hong Peng.

P1 was the contract signed between his company and Kuok Ling Timber Industries Sdn Bhd. The sawn timber would be delivered to

Taiwan. He has stated that Mr. Chen Hong Peng was no longer with the company. The sawn timber were delivered to Taiwan but not the same quantity. He was told that the ship sank. He was still in Sibu when he was told that the ship sank. He did know that some sawn timber were recovered. He did see the recovered sawn timber which were wet and covered with mud.

When he received the sawn timber in Taiwan the quality was not good. And he had sold some of the sawn timber to his customer and some were returned due to the poor quality. The poor quality was as a result of the sawn timber being submerged in water and covered with mud when the vessel sank.

In cross-examination PW4 stated that he has personal knowledge of the dimension and specification of the sawn timber that he ordered. The sawn timber were ordered by Chen Hong Peng and himself. He said that Chen Hong Peng was no longer with the company. He left the company about three years ago.

The case for the defendants is as follows:

Koon Yew Choice (DW1) has testified in examination-in-chief that 'MV Thonfullin' belong to Thonfullin Enterprise Sdn Bhd. He is the managing director of Thonfullin Enterprise Sdn Bhd ('the company') for almost five years. They provided service to the sawmill by transporting the sawn timber to Tg Manis. Before he joined the company he was working with Tetsan Timber Sdn Bhd as a shipping supervisor. Tetsan Timber Sdn Bhd was involved in the export and import of timber. He knew Kuok Ling Timber Industries Sdn Bhd. A friend of his introduced him to the manager of Kuok Ling Timber Industries Sdn Bhd, Mr Sia. He has transported sawn timber for the plaintiffs two times. The second time was on 28 May 1995. The manager of the plaintiffs rang him up and asked him to provide the service.

P4 was the delivery order issued by the plaintiffs to his company. The delivery order did not state the value of the sawn timber. He also stated that the vessel carrying the 233 bundles of sawn timber sank at the wharf at Tetsan Timber Sdn Bhd on 30 May 1995. He did not know why the vessel sank. The 233 bundles of sawn timber went into the water. They managed to salvage 147 bundles. They transported 147 bundles of sawn timber to the plaintiffs but the plaintiffs refused to acknowledge receipt of the timber.

He instructed three tongkangs to recover the 147 bundles of sawn timber.

DAB2 is an invoice issued by Kong Chee Siong to Thonfullin Enterprise Sdn Bhd. And it was stated the amount of sawn timber which was transported from 'MV Thonfullin' to Kuok Ling Timber Industries Sdn Bhd by the vessel 'MV Sri Bintang'. The date stated 1 June 1995 — 19 bundles, 2 June 1995 — 20 bundles, 3 June 1995 — 14 bundles, total is 53 bundles. He did sign on the invoice.

DAB3 is an invoice issued by Lick Teck Shipping Sdn Bhd to Thonfullin Enterprise Sdn Bhd in respect of the transport of 59 bundles of sawn timber to the plaintiffs. He did sign on the invoice.

A DAB4 shows two invoices. Invoice No 1464 dated 21 June 1995 is in relation to the salvage and transport of 24 bundles of sawn timber to the plaintiffs. The invoice was signed by Sin Wee Ching as a representative of the plaintiffs. Invoice No 1362 dated 21 June 1995 is issued by Hii Kiong Mee to Thonfullin for the transport charges of the 24 bundles of sawn timber.

B DAB5 is a debit note issued by Caswan Jaya Sdn Bhd to Thonfullin Enterprise Sdn Bhd for the freight charges for 11 bundles of sawn timber carried by the vessel 'Gui Ting' to Kuok Ling Timber Sdn Bhd. He signed on the bottom left.

The 147 salvaged bundles of sawn timber were returned to the C plaintiffs. The plaintiffs did not make any complaint to him after he returned the sawn timber.

He has been involved in providing services to transport sawn timber from sawmills to Tg Manis for almost five years. During those five years the normal freight charges is RM13 for one ton. And that did not include any D insurance coverage. From his experience the insurance coverage is the responsibility of the sawmill. The sawmill owner has to buy the insurance. That is from his experience and it is also the normal trade practice and market practice.

For the five years, he transported sawn timber from sawmills to Tg Manis he did not ever buy insurance coverage for the sawn timber.

E In the present case, he did not buy insurance for Kuok Ling Timber. And they did not ask them to insure the sawn timber. And they normally do not do that as well. They only collected the freight charges excluding insurance. And this also happened to the plaintiffs.

In cross-examination, DW1 stated that from 1983 to 1995, he was F employed as the shipping supervisor of Tetsan Timber. As a shipping supervisor with Tetsan Timber he was responsible to arrange the transportation of sawn timber to Tg Manis. He was also responsible for the documentation such as the bill of lading and invoice for the transportation of the sawn timber. With the price provided by the marketing manager, he prepared the invoice based on it.

G When he prepared the invoices at Tetsan Timber, the market prices of sawn timber were quoted in US dollars.

In P1, item 9 the prices of sawn timber were quoted in US dollars. The prices for kapur and keruing were quoted as USD380 per cubic meter. The prices for meranti and alan batu were quoted as USD360 per cubic meter. H And the prices for MLH were quoted as USD260 per cubic meter.

Prior to 29 May 1995, Thonfullin Enterprise had already transported sawn timber in 'MV Thonfullin' on behalf of Kuok Ling Timber.

Prior to 29 May 1995, there was no written contract between Thonfullin and the plaintiffs.

I On 12 April 1995, the plaintiffs engaged Thonfullin to carry 253 bundles of sawn timber on 'MV Thonfullin' from the sawmill of Kuok Ling Timber at Tg Maling to Tg Manis. D1 is the delivery order. The sawn

timber were to be lodged at Tg Manis onto the ocean going vessel 'MV Unison Great'. The freight charges charged by Thonfullin was at the rate of RM13 per ton. Apart from the delivery order (D1) there was no other document prepared and signed between Thonfullin and the plaintiffs for the transportation of the 253 bundles of sawn timber. Thonfullin at the time of accepting delivery of the 253 bundles of sawn timber did not issue a contract or bill of lading setting out the terms and conditions of the carriage and transportation of the sawn timber. Thonfullin at the time of accepting delivery of the 253 bundles of sawn timber did not bring to the attention of the plaintiffs any terms and conditions of the carriage and transportation of the sawn timber. Thonfullin at the time of accepting delivery of the 253 bundles of sawn timber did bring to the attention of the plaintiffs the special terms and condition of the carriage and transportation of sawn timber which will limit the liability of Thonfullin. He brought it to the attention of Mr Sia the manager of the plaintiffs before 12 April 1995.

He was further cross-examined as follows:

Q: Did you tell your lawyer?

A : Yes.

Q : I suggest you did not do so.

A : I don't agree.

Q : If you had done so your lawyer would have pleaded this in the defence by giving particulars of the oral contract?

A : I don't know. Maybe he forgot.

Q : If you had done so your lawyer would have put the terms and conditions of the oral contract to the plaintiff's witnesses?

A : I do not know because that is the job of the lawyer.

DW1 stated that D2 is the delivery order dated 14 April 1995 issued by the plaintiffs and acknowledged by Thonfullin to accept delivery of 286 bundles of sawn timber and to transport them from the sawmill to Tg Manis to be loaded onto ocean going vessel the 'MV Unison Great'. At the time of accepting the 286 bundles of sawn timber he did bring to the attention of the plaintiffs that they are only collecting the freight charges for the transportation of the sawn timber. They are not responsible for the insurance coverage. He disagreed that he did not do so.

He was cross-examined as follows:

Q: If you had done so it would have been pleaded in the defence as oral contractual terms for the carriage of sawn timber between Thonfullin and Kuok Ling Timber?

A: This is dealt with by my lawyer. I don't know. Maybe he forgot.

He agreed that P4 is the delivery order No 7388 dated 29 May 1995 and acknowledged by Thonfullin in accepting delivery of 233 bundles of sawn timber to be transported from the sawmill of the plaintiffs at Tg Maling to Tg Manis and to be loaded onto the ocean going vessel 'MV Berry'. From the delivery order, Thonfullin knew that the 233 bundles of sawn timber would be exported. Apart from the delivery order no other document or

A contract were prepared and signed between Thonfullin and the plaintiffs for the transportation of the 233 bundles of sawn timber.

At the time of accepting delivery of the 233 bundles of sawn timber Thonfullin did not issue any contract or bill of lading setting out the terms and conditions of the carriage and transportation of the 233 bundles of sawn timber. He stated that at the time of accepting the delivery of the 233 bundles of sawn timber he did orally inform the plaintiffs that they only collect freight charges for the transportation of the sawn timber. They are not responsible for the insurance coverage. And they were not sure of the amount to be insured. And the plaintiffs also did not tell them to insure the sawn timber. He further stated that they orally agreed that they only collect freight charges and not responsible for insurance. This has been the practice all this while.

From his experience as a shipping supervisor it has been the practice that the sawmill concerned would have to insure their own cargo and they only collect freight charges. And they did not put that in writing in the delivery order. And if they have to i\be the one to insure the cargo they would not agree to transport the cargo as the freight charges would not be able to cover the insurance and it would not be profitable. In this case the plaintiffs did not inform them that they have to insure the goods and neither did the plaintiffs inform them the amount to be insured. He did not bother to find out the value of the sawn timber. He agreed that 233 bundles of sawn timber costs a lot of money. If the 233 bundles of sawn timber were to sink or be lost then someone would lose a lot of money.

He stated that Kuok Ling Timber Sawmill at Tg Maling was downriver from Sibu. Tg Manis was downriver from Sibu.

On 29 May 1995, they received information from the shipping agent that the arrival of the ocean going vessel was delayed so they berthed the vessel at Tetsan wharf to wait another day and also wait for further notice from the shipping agent. The 'MV Thonfullin' did not transport the 233 bundles of sawn timber from the sawmill at Tg Maling downriver to Tg Manis.

Tetsan wharf was upriver from Sibu. The 'MV Thonfullin' on 29 May 1995 travelled upriver from Tg Maling to Tetsan wharf at the Upper Lanang Industrial Estate, Sibu. The 'MV Thonfullin' did not travel downriver to Tg Manis and waited for the ocean going vessel there because they were informed by the shipping agent that the ocean going vessel was delayed and were advised to wait before proceeding to Tg Manis as there was no wharf to berth the vessel.

He did not seek the permission of the plaintiffs to travel upriver from Tg Maling to Tetsan wharf. The 'MV Thonfullin' was berthed at Tetsan wharf when it sank. One ordinary crew member was on board the vessel when it sank. He agreed that he did not know why it sank.

He was cross-examined as follows:

Q: The reason why Kuok Ling Timber did not ask you to insure the sawn timber was because as soon as Kuok Ling Timber delivered the

233 bundles of sawn timber to you have to look after and care for these 233 bundles in your custody irrespective of whether or not either party was responsible to buy insurance? A

A: Yes.

Q: As a bailee or keeper of the sawn timber you knew of the risk involved and it was for you to decide whether or not to buy insurance? B

A: I don't agree. As I have told the court earlier I do not even know the actual price of the sawn timber and moreover from our experience and practice all this while we only collect the freight charges. We don't insure them. Sometimes the freight charges is not enough to cover the cost of the insurance because we don't know how much to insure .

He was asked: 'Since the value or costs of the sawn timber being transported was so high if Thonfullin said that it was to be released from this liability of insuring the sawn timber will you not agree that as a prudent businessman you would want to ensure that Thonfullin was fully protected and the only way to do this was to put this term and condition in writing?' and he answered 'We did not put that in writing because we followed the practice of using oral agreement'. He agreed that the most prudent thing to do would be put it in writing. Thonfullin did not do that. C D

In DAB5, there is stated words to the effect that the carrier shall not be responsible for loss or damage to the goods whatsoever and howsoever caused during transit or voyage and loading or unloading. He agreed that this was printed by Caswan Jaya Sdn Bhd and given to Thonfullin. Thonfullin did not print something similar to this to limit their liability on their invoice or delivery order or documents. He also stated that the sawmill who contracted with Thonfullin was aware of the limitation of liability as they have been orally informed. He also stated that he did inform Mr Sia about this. E F

As a result of the sawn timber being submerged in the water, they had been stained by the water He did not know of the 147 bundles of sawn timber recovered only 110 bundles could be exported. He did not know of the 110 bundles exported only 96 bundles could be sold at a lower market price. He agreed that in P1 item 9 the price for the sawn timber stated therein was FOB Tg Manis. FOB means free on board. He agreed that means Pro Sooner was responsible for the freight charges, insurance and everything else to ship the sawn timber from Tg Manis to Taiwan. He agreed that means the buyer was responsible for the insurance coverage for the sawn timber to be exported. G

In re-examination, DW1 stated that on 12 April 1995 he did not ask for the price the first reason is only the sawmill itself knows about the price of the sawn timber. And all this while they are only responsible for delivery and transport of the sawn timber from the sawmill to Tg Manis and they are not responsible for insurance coverage. Secondly, all the vessels operating at Rejang river adopt this practice, that is, the sawmill has to insure their sawn timber. The price of sawn timber is confidential. So they did not ask the price. It has been the practice all this while. And for the past 12 years as shipping supervisor that is the sawmill owner to insure the cargo. H I

A Ling Chiong Hing (DW2) testified in examination-in-chief that he has been in the business of shipping company dealing with transport of sawn timber at Rejang river, Sibu for 30 years. He made arrangement for the transport of sawn timber from the sawmill by using barge to Tg Manis and to the ocean going vessel to be exported.

B He is the chairman of 3rd, 6th and 7th Division Lighters Association Sarawak ('the association'). He has been a member of the association for 15 years. He has been the chairman in 1998 and 1999. All the members of the association are involved in shipping business. The association has between 200 to 300 members. Their members were involved in transporting sawn timber. The charges for the transportation of sawn C timber is based on the tonnage. The charges never include insurance coverage. This applied to all the members.

In normal case, the owner of the cargo has to buy the insurance coverage for the sawn timber to be transported. The owner of the cargo has to buy the insurance because only the owner of the cargo would know the D value of the cargo and the amount to be insured. They only collect the freight charges. There is no contract to that effect of what he said.

Normally there is a remark written on the reverse of the invoice stating that the owner have to insure their own cargo. All this while it has been the common knowledge for all the cargo owners to insure their own cargo whether it was put down in writing or not. It has been the practice all the E while during his 30 years of this line of business. This practice has been going on for fairly long period of time.

All his association members who involve in providing the transportation service of sawn timber from sawmill to Tg Manis knew this practice. For the past 30 years, he never took out insurance for the sawn timber transported F from sawmills to Tg Manis on behalf of the cargo owner because that is their cargo and the price of the cargo is confidential.

As chairman of the association, he knew the members did not take out insurance coverage for the sawn timber transported from sawmill to Tg Manis. So the practice is for the cargo owner to insure the cargo and not the vessel owner to insure it.

G In cross-examination, DW2 stated that his association has regular meetings. During the meetings the association did raise the issue of insurance coverage for goods transported in vessels belonging to members. He agreed that this issue was brought up because there had been many disputes between cargo owners and members of the association as to who is H responsible for insurance coverage for cargoes transported in vessels belonging to members. There were a lot of discussion among the members as to who should be responsible for the insurance coverage. One of the resolutions passed is that they do not insure the cargo. It is the responsibility of the cargo owner to do so. This resolution was passed about five years ago. Therefore it became the policy of the association and its members five years I ago that the members should no longer be responsible for insurance coverage of cargo transported in vessels belonging to members. The resolution was binding on the members of the association. It was not

binding on other people or third parties who were not members of the association. He agreed that the association advised its members to protect themselves by printing on their invoices or bill of lading or delivery orders words to the effect that the cargo owners or owners of sawn timber are responsible to buy insurance coverage for the cargo transported.

He was also asked as follows:

Q: Therefore the Association also advised its members to protect themselves by entering into written contract setting out clearly the terms and conditions that it is the responsibility of the cargo owner or owners of sawn timber to buy insurance coverage for the cargo transported?

A: No. The cargo owner understand that it is their responsibility to insure the cargo.

Q: The Association also advise the members to protect themselves by printing on their invoices or bill of lading or delivery order words to the effect that the members shall not be responsible for the loss or damage caused to the goods being transported or in transit or during loading or unloading?

A: Yes.

He is the managing director of Caswan Jaya Sdn Bhd. DAB5 is the debit note issued by his company to Thonfullin Enterprise Sdn Bhd dated 21 July 1995. There are some printed words at the bottom of the debit note. The words printed are regarding the carrier is not responsible for the loss or damage of the cargo. This was printed because he followed the advice of the association. In fact it was printed long before the resolution was passed. It was printed for his own self-interest and protection.

In re-examination, DW2 stated that the practice for the cargo owner to insure their own cargo has been accepted and practised by the association members well before the resolution was passed. As experienced businessman for the past 30 years involved in the transportation of sawn timber to Tg Manis he never buy insurance coverage for the sawn timber being transported.

Ngo Heau Hoi (DW3) testified that he is a sawmiller. He is the managing director of San Hup Choon Sawmill Sdn Bhd for three years. His company has been operating for ten years. They process the timber logs to sawn timber for export. He transported the sawn timber from sawmill to Tg Manis and then they load to the sea vessel. They called the local barge to transport the sawn timber from their sawmill to Tg Manis. They pay the freight charges to the owner of the barge to carry the sawn timber from Sibu to Tg Manis. The freight charges is RM13 per ton. The freight charges do not include the insurance.

He was asked as follows:

Q: Who is going to buy the insurance for the sawn timber to be transported from Sibu to Tg Manis?

A: We pay.

Q: Explain what you mean by 'we pay'?

A We are the owner of the sawn timber. All the while by local practices and the local custom the owner paid the insurance.

A For the past ten years, it was his practice to buy the insurance cover for the sawn timber to be transported from Sibu to Tg Manis. He knew 'MV Thonfullin' since 1990 as 'MV Thonfullin' was helping them to carry sawn timber from their sawmill to Tg Manis. 'MV Thonfullin' charged him RM13 per ton. This RM13 per ton did not include the insurance cover for the sawn timber transported. They paid the insurance for the sawn timber B transported.

In cross-examination, DW3 stated that he used more than five vessels to transport sawn timber from Sibu to Tg Manis namely 'MV Thonfullin', 'MV Ing Hua Lien', MV Ing Hua Fu', 'MV Ing Hua Jian' and 'MV Ing Hua Soon'.

C When he used the last four vessels to transport sawn timber the companies just issue the invoice to his company. The invoice did not carry a remark to the effect that the shipowner was not responsible for any loss and damage to the sawn timber being transported. He could not remember whether he has seen invoices with such remarks. The owners of the last four D vessels told him that about five years ago the 3rd, 6th and 7th Division Lighters Association passed a resolution stating that its members shall not be responsible to buy insurance for sawn timber being transported. He has been told by the shipowners that they have to buy the insurance themselves.

He agreed that the reason why he bought the insurance was because he was told by the shipowner that he has to buy insurance. That was a term E and condition for the transportation of his sawn timber from Sibu to Tg Manis. It was an oral agreement between his company and the vessel owners. He agreed that his buying of the insurance was because of the oral contract. The owner of 'MV Thonfullin' told him that he will not cover the insurance. He understood that to be a term and condition of the oral F agreement that he has to buy insurance cover himself. The vessel owners did not send any written notice or letters to his company to tell him that he has to buy insurance coverage for the sawn timber being transported.

In re-examination, DW3 agreed that because of the local practice and local custom that it is for the sawn timber owner to buy the insurance G coverage for the sawn timber to be transported from Sibu to Tg Manis.

I shall now deal with the case before me.

PW1 has testified that P4 is the delivery order dated 29 May 1995 issued by the plaintiffs to the defendants. PW1 has stated that the 233 bundles of sawn timber were delivered and loaded onto 'MV H Thonfullin' to be transported to Tg Manis to be loaded onto the ocean going vessel 'MV Berry' for export to Pro Sooner Co Ltd of Taiwan. He was present when someone on board the 'MV Thonfullin' signed the delivery order. Ivy Kho (PW3) signed on behalf of the plaintiffs.

PW1 has stated that when he asked 'MV Thonfullin' to transport the I sawn timber from the sawmill to Tg Manis he has to pay the freight charges of RM13 per ton. He did not have to buy insurance for the timber.

In cross-examination, PW1 has stated that the freight charges is RM13 per ton.

PW3 has testified that P4 was prepared by her after the sawn timber have been loaded into the vessel 'MV Thonfullin'. Someone signed on behalf of 'MV Thonfullln' acknowledging receipt of the sawn timber. She did witness the loading of the sawn timber onto 'MV Thonfullin'. A

DW1 has testified that the normal freight charges to transport sawn timber from Tg Maling to Tg Manis is RM13 per ton and this does not include any insurance coverage. B

I find as a fact that the 233 bundles of sawn timber were delivered and loaded onto the 'MV Thonfullin' on 29 May 1995. I also find as a fact that the agreed freight rate between the plaintiffs and the defendants is RM13 per ton exclusive of insurance coverage. I am thus of the view that the contract between the plaintiffs and the defendants was a bailment for reward. C

In para 6 of the statement of claim it is averred that 'On or about 30 May 1995 at around 4.30am the said MV Thonfullin while being berthed at or near the wharf of Tetsan Timber Berhad, at Upper Lanang Road, Sibu, Sarawak sank'. The defendants in para 5 of the defence averred that 'Save that at the material times the said MV Thonfullin sank, paragraph 6 of the statement of claim is not admitted. The defendants say that it is an Act of God.' D

PW1 has testified that he was informed by someone through the phone that the 'MV Thonfullin' sank. As a result he lodged a report (P5) at the Marine Department, Sibu. He also lodged a police report (P6). In P6, it is stated that on 30 May 1995 at about 8.30am he received a telephone call from Thonfullin Enterprise Sdn Bhd Sibu informing him that 'MV Thonfullin' which carried sawn timber belonging to the plaintiffs had sank at Tetsan wharf, Upper Lanang, Sibu. E

DW1 the managing director of Thonfullin Enterprise Sdn Bhd has testified that the 'MV Thonfullin' sank while being berthed at Tetsan wharf on 30 May 1995. F

I am of the view that the plaintiffs have proved that on 30 May 1995 'MV Thonfullin' sank while being berthed at Tetsan wharf, Upper Lanang, Sibu. G

The defendants have pleaded that 'MV Thonfullin' sank due to an act of God.

In *Kwan Sun Ming v Chak Chee Hing* [1965] 1 MLJ 236, his Lordship Wylie CJ (Borneo) (delivering the judgment of the Federal Court) at pp 236I–237D said: H

> I refer to 8 *Halsbury's Law of England* (3rd Ed) at p 183 for a concise definition of what constitutes an 'act of God':
>
> > 'An act of God, in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of I

A the person sought to be made liable for it, or who seeks to excuse himself on the ground of it ... '.

A feature of both those definitions is that the event must be one which could not have been foreseen and which could not have been guarded against. It is obvious that in a towage contract of this nature a storm must be expected and would have to be guarded against, especially in the open sea. The appellant B would therefore be bound as part of his contract to take all precautions necessary against storms that might reasonably be foreseen. For a storm at sea to be regarded as an act of God it would have to be a storm that could not have been reasonably foreseen in the circumstances.

DW1 the managing director of Thonfullin Enterprise Sdn Bhd has testified C that 'MV Thonfullin' belong to his company. He has stated that the vessel carrying the 233 bundles of sawn timber sank at the wharf at Tetsan Timber Sdn Bhd on 30 May 1995. He did not know why the vessel sank.

The defendants did not adduce evidence to the effect that there was a sudden violent storm or an extraordinary high tide in the Rejang river at that material time which could not have been foreseen and which could not have D been guarded against. The defendants have also not adduced any evidence which could have constituted an act of God.

As such, I am of the view that the defendants have failed to prove that 'MV Thonfullin' sank due to an act of God.

In the case of *Port Swettenham Authority v TW Wu and Co (M) Sdn Bhd* E [1978] 2 MLJ 137, Lord Salmon (delivering the judgment of the Privy Council) at p 138D–H said:

The law in relation to bailment is set out in ss 104 and 105 of the Contracts (Malay States) Ordinance of 1950 which read as follows:

104 In all cases of bailment the bailee is bound to take as much care of the F goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

105 The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in s 104 of this Ordinance.

G

Their Lordships consider that the onus is upon the defendants under ss 104 and 105 to prove that they had taken as much care of the plaintiffs' goods as a Port Authority of ordinary prudence would, under similar circumstances, have taken of its own goods of the same bulk, quality and value as the 64 lost cases. See *Lee Heng v Port Swettenham Authority* [1971] 2 MLJ 27 at p 29 and H *Indian Contract and Specific Relief Acts* by Pollock and Mulla (6 Ed) at p 521 in which the learned authors, who are generally regarded as authorities of great weight, state:

'In cases governed by the provisions of ss 151 and 152 [which correspond exactly with ss 104 and 105] the loss of damage of goods, entrusted to a bailee is prima facie evidence of negligence, and the burden of proof, I therefore, to disprove negligence lies on the bailee.'

Their Lordships respectfully agree with this statement of the legal position.

And at p 139A–D, Lord Salmon said:

> The undisputed facts of the present case already recited in this judgment establish that the defendants were clearly bailees for reward. However, this may be, in their Lordships' view the onus is always upon the bailee, whether he be a bailee for reward or a gratuitous bailee, to prove that the loss of any goods bailed to him was not caused by any fault of his or of any of his servants or agents to whom he entrusted the goods for safe keeping. Accordingly the onus of proving that the 1088 of the goods deposited with the defendants for safe custody was not caused by the negligence or misconduct of their servants in the course of their employment, without any doubt, lies on the defendants. *Hunt and Winterbotham Ltd v BRS* [1962] 1 QB 617:
>
> > 'If an owner of goods leaves them with another person who undertakes to mind them for reward, and then fails to produce them when they are wanted, it is a reasonable inference, in the absence of any explanation, that he cannot have looked after them properly in other words, that he has at least been negligent. Accordingly, it is right to say in such a case ... that it is for the depositee to show that he has not been negligent ... .'

The plaintiffs have proved that the 233 bundles of various species of sawn timber were loaded onto the 'MV Thonfullin' on 29 May 1995. The plaintiffs have also proved that 'MV Thonfullin' sank on 30 May 1995 at the wharf of Tetsan Timber Sdn Bhd, Upper Lanang Road, Sibu. As a result the 233 bundles of sawn timber fell into the water. And the sawn timber were damaged and deteriorated in quality.

So the onus is for the defendants as bailees for reward to prove that the damage to the sawn timber bailed to them were not caused by any fault of theirs or of any of their servants or agents.

DW1 has testified that 'MV Thonfullin' carrying the 233 bundles of sawn timber sank at the wharf at Tetsan Timber Sdn Bhd on 30 May 1995. However, he did not know why the vessel 'MV Thonfullin' sank. As such, I find that the defendants have failed to prove that they had taken due care of the plaintiffs' sawn timber in providing transport of sawn timber from sawmill at Tg Maling to Tg Manis. This is a clear case of res ipsa loquitur.

The defendants had failed to show that they had exercised due care and diligence. I have no hesitation in finding that the defendants failed to show that they had taken reasonable care of the plaintiffs' 233 bundles of sawn timber.

The defendants in para 8 of the defence say that by local custom and/or trade practices it is for the plaintiffs to take up insurance for the sawn timber to be carried by any vessel.

In Sir John Woodroffe & Syed Amir Ali's *Law of Evidence* (15th Ed, 1993) (Vol 1) at pp 624–625 state as follows:

> 4 Custom. (a) Essentials. 'Customs', as used in the sense of a rule which, in a particular district, class or family, has from long usage, obtained the force of law, must be: (a) ancient; (b) continued, unaltered, uninterrupted, uniform, constant; (c) peaceable and acquiesced in; (d) reasonable; (e) certain and definite; (f) compulsory and not optional to every person to follow or not. The acts required for the establishment of customary law must have been performed with the consciousness that

A they spring from a legal necessity; and (g) must not be immoral. It must not be opposed to morality or public policy and it must not be expressly forbidden by the Legislature. A custom or a practice cannot be allowed to prevail over a statutory rule.

DW1 has testified that from his five years experience of transporting sawn timber from sawmills to Tg Manis it was the responsibility of the cargo B owners to buy insurance.

From the evidence of DW2 it is clear that the association only passed the resolution about five years ago stating that it is the responsibility of the cargo owners to buy insurance.

DW3 in cross-examination said that he was told by the owners of C vessels about five years ago that the association had passed a resolution that its members shall not be responsible to buy insurance for sawn timber being transported.

The defendants have not proved that there is a custom or practice 30 years ago that the cargo owners have to buy insurance for the sawn timber D being transported in vessels.

I find as a fact that it was about five years ago that the association passed a resolution to the effect that it is the responsibility of the cargo owners to buy insurance.

I accept the contention of the plaintiffs that the defendants have not E adduced any evidence to show that this resolution had been advertised in local newspapers or sent to cargo owners or the plaintiffs. The defendants have not adduced any evidence to show that the plaintiffs were aware of this resolution and had agreed to abide by it. As such, I am of the view that the practice or custom that the cargo owners have to buy insurance is not generally known and could not have the force of law (see *Chan Cheng Kum & Anor v Wah Tat Bank Ltd & Anor* [1971] 1 MLJ 177). F

I accept the evidence of PW1 that he was not told by DW1 that it was the plaintiffs' responsibility to take out insurance cover for the 233 bundles of sawn timber. I accept the evidence of PW1 that the only term was that the plaintiffs have to pay freight charges of RM13 per ton. I accept the G evidence of PW1 that he did not know whether there was any custom or trade practice that the owner of goods to be transported in vessels must buy insurance for the goods.

Further the defendants have failed to prove that there has been long usage that it is the responsibility of the cargo owners to take out insurance for their cargo and that this usage has continued uninterrupted. As such, the H defendants have failed to prove that such custom or practice existed.

The law does not forbid the vessel owner to exempt himself by contract from liability for the negligence of himself, his servants or agents but if the vessel owner desires so to exempt himself, it requires that he shall do so in express, plain and unambiguous terms. However, there is no such I exemption clause in our case.

Even if there was a custom or trade practice that it was the responsibility of the plaintiffs to insure the 233 bundles of sawn timber, in the absence of

any exemption clause to the effect that the defendants are not liable for any loss or damage caused by the negligence of the defendants, their servants or agents, and if negligence is proved then the defendants are liable for their breach of duty as bailees for reward to use reasonable care and skill to ensure the safety of the 233 bundles of sawn timber.

In our case the plaintiffs have proved that the damage to the sawn timber were caused by the negligence of the defendants due to the sinking of 'MV Thonfullin'. As such, I find the defendants liable for the damage caused to the sawn timber.

The learned counsel for the defendants in his written submission has contended that exh P1 is not admissible because this document contain language other than English and cited O 92 r 1 of the Rules of the High Court 1980 ('the RHC') and the case of *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 in support.

In the case of *Yap Piew Chuan v Araca Enterprise Sdn Bhd* [1998] 1 AMR 645, his Lordship Abdul Aziz J at pp 651 and 652 said:

> ... The description of the goods is, however, in Chinese characters but does include, in most cases, the words 'satin', 'nylon tricot', or 'polyter tricot brush'. The quantities are in English, for example, so many pieces of so many yards or meters at such and such a price per yard or meter.
>
> It is because of the appearance of the words in Chinese characters in the invoices, which are used to describe the goods, that the defendants contend that there was a procedural defect in the application for summary judgment. They rely on the following passage from the judgment of the Supreme Court in *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 at p 423:
>
> > 'We find that O 92 r 1 of the RHC, is a mandatory provision which requires that any document which is not in the national language or in the English language must be translated into the national language before it can be admitted as an exhibit.'
>
> The defendants argue in effect that the invoices should not be admitted as exhibits and that without them there is no evidence to substantiate the claim of RM672,408.32. ...
>
> In the *Sykt Telekom Malaysia* case, the document in question was a book called Malaysia Business Chinese Directory which was in Chinese writing. The question was whether it was a telephone directory. The Supreme Court said that it was impossible for the learned judge, by looking at the book, to come to any decision on the question because he himself was unable to understand what the book contained. It was a clear case of a document not being in Malay or English.
>
> In the present case, I view the invoices as documents in the English Language but containing certain words in Chinese. I am able to understand the nature of the documents and the transactions that they record. What I do not know is the description of the goods concerned. The description of the goods is, however, not in issue. There is no dispute as to the identity of the goods. The defendants themselves know well enough what the goods were to be able to allege that they were damaged and not merchantable. For those reasons I am of opinion that the invoices are not caught by the passage in the

Sykt Telekom Malaysia case that I have cited. They may be admitted as exhibits and they can be seen to substantiate the plaintiff's claim.

In P1 the agreement is in the English language except for item 8 under 'Face' there are two Chinese characters and there are three Chinese characters above the word 'Buyer'. P1 clearly sets out in English the name of the seller, buyer, the species of timber bought and sold, the quantity, the specifications and price etc.

I am able to understand the nature of the document and the particulars stated. What I do not know is what is the marking that the two Chinese characters in item 8 represent. The marking of the sawn timber is, however, not in issue.

PW2 has testified that the three Chinese characters above the word 'Buyer' is the signature of Mr Cheng Hong Peng.

PW4 has clearly identified the three Chinese characters above the word 'Buyer' as the signature of Cheng Hong Peng. He was present when P1 was signed.

I accept the evidence of PW2 and PW4 that the three Chinese characters above the word 'Buyer' is the signature of Cheng Hong Peng.

As such, I am of the view that O 92 r 1 of the RHC and the case of *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420 are not applicable. I hold that P1 is admissible in evidence.

I accept the evidence of PW1 that the total value of the 233 bundles of sawn timber was in the sum of USD110,831.33.

The defendants recovered 148 bundles of sawn timber from the river and returned these to the plaintiffs. I accept the evidence of PW1, PW2 and PW4 that the recovered sawn timber were covered with mud and stained because they had been in the water for a few days. Thirty-eight bundles of these recovered sawn timber were rejected for export because their quality had deteriorated. Only 110 bundles of recovered sawn timber were subsequently exported to Pro Sooner Co Ltd of Taiwan. However, Pro Sooner Co Ltd could only sell 96 bundles to their customers in Taiwan. The market prices for these 96 bundles were sold lower then the market prices for the 233 bundles because the quality of the sawn timber has been affected after they were submerged in water for a few days as a result of the sinking of 'MV Thonfullin'. The 96 bundles were sold for USD36,193.83. Therefore the plaintiff had incurred a loss of USD74,637.50 (ie USD110,831.33 minus USD36,193.83 equals USD74,637.50).

I find that the plaintiffs have proved their case against the defendants.

I therefore enter judgment to the plaintiffs in the sum of USD74,637.50 together with interest thereon at 8% pa from the date of the writ of summons till full payment and costs to be taxed unless agreed.

Plaintiff's claim allowed.

Reported by Jafisah Jaafar